Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-1179

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM GRANT, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court is reported at 430 F. Supp. 931.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1978, and a petition for rehearing was denied on November 30, 1978 (Pet. App. 3a). On December 20, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 29, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the interception of oral communications at specified premises, law enforcement agents may lawfully enter those premises, without separate express judicial authorization, to install and repair the device used to make the interceptions.

2. Whether a district court is empowered by statute to authorize surreptitious entries necessary to effectuate an oral interception order.

3. Whether petitioners have standing to challenge the admissibility of evidence of intercepted communications on the ground that government agents made surreptitious entries into premises in which petitioners had neither a proprietary nor a possessory interest.

4. Whether the government's unintentional failure to disclose the existence of a previous state wiretap in its electronic surveillance application required suppression of intercepted communications.

5. Whether the government's application provided information sufficient to support an order authorizing the interception of oral communications.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners Guerriero and Irace were also convicted of conspiracy to commit that crime, in violation of 18 U.S.C. 371. Petitioners were each sentenced to two years' imprisonment, all but 90 days of which was suspended in favor of two years' probation, and a fine of $5,000 (Pet. App. 1a).

The evidence at trial, which is not in dispute, showed that from June 1974 through early April 1976, co-

defendants Anthony Volpe and Michael T. O'Brien, with the assistance of several other persons including petitioners, operated a large-scale illegal gambling enterprise out of a storefront office located at 103 New Britain Avenue in Hartford, Connecticut. Petitioner Irace was a bookmaker who received lay-off bets from O'Brien; petitioners Grant and Guerriero participated in a numbers operation that provided a service to O'Brien's customers by accepting their numbers wagers.

Prior to trial, petitioners moved to suppress recordings of wire and oral communications that had been intercepted from the storefront office pursuant to court orders issued on December 16, 1974, and January 16, 1975. The relevant facts concerning the execution of the interception orders are set forth in detail in our brief in *Volpe* v. *United States,* No. 78-385, at 6-8.[1] In essence, the evidence at the suppression hearing showed that the interception orders specifically identified the premises (103 New Britain Avenue) on which the oral and wire communications were to occur. In implementing these orders, FBI agents surreptitiously entered the storefront premises identified in the orders as well as the basement area of the building at that location, to install a listening device and to make the necessary wire connections.[2]

The district court denied the motions to suppress, finding that the interception "orders and their subsequent execution were reasonable and lawful" (430 F. Supp. at 935) and that, at the time the initial order was issued, the court had been aware that it would be necessary for the agents covertly to enter and install a listening device

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[1]We are sending petitioners' counsel a copy of our brief in *Volpe*.

[2]Access to the common area of the basement was through a side entrance to the building at 11 Julius Street, which was referred to only in the second interception order. On one occasion the agents, by means of a ruse, entered an enclosed area of the basement through John's Deli at 99 New Britain Avenue.

within the premises (*id.* at 936, 942). Furthermore, the court concluded that its eavesdropping orders implicitly authorized the agents to enter the premises and install the necessary equipment to accomplish the interceptions (*id.* at 942-943).[3] The court of appeals affirmed (Pet. App. 1a-2a).

ARGUMENT

The petitioners in this case were indicted with but tried separately from the petitioners in *Volpe* v. *United States, supra*. Prior to trial, petitioners, together with the petitioners in *Volpe*, moved to suppress the fruits of the electronic surveillance. In arguing that the suppression motion should have been granted (Pet. 21-26), petitioners rely on the same arguments presented by the petitioners in *Volpe*. We in turn rely on our response to the petition in that case.

1. Petitioners contend (Pet. 23-26) that the oral interception orders did not implicitly include judicial approval for government agents surreptitiously to enter private premises for the purposes of installing a listening device and that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, does not empower a district court to authorize such entries. As we have explained in our brief in *Volpe* (pages

[3]In addition, the district court held that petitioners and their co-defendants lacked standing to challenge the covert entries into the basement areas of the building (430 F. Supp. at 945-946), that the government's failure to disclose a previous state wiretap involving O'Brien and the premises at 103 New Britain Avenue was an unintentional omission, and that the government had sought in good faith to comply with the provisions of 18 U.S.C. 2518(1)(e) (*id.* at 947-950). Finally, the court concluded that, since the target premises were "known to be using 'total telephone service,' in which incoming calls were being transferred and re-transferred to unknown receivers, oral interception appeared essential to the accomplishment of an effective surveillance" (*id.* at 947).

10-11), these issues are now before the Court in *Dalia* v. *United States*, No. 77-1722, argued January 9-10, 1979.[4]

There is no reason for the Court to defer disposition of the instant petition pending the decision in *Dalia*, however, because petitioners lack standing to challenge the admission of the conversations intercepted from the storefront office at 103 New Britain Avenue. If the overheard conversations introduced at trial were illegally obtained, the illegality related not to the seizure of the conversations themselves, which was judicially authorized in full conformity with Title III and the Fourth Amendment,[5] but to the surreptitious entries to install and repair the listening device.

As the district court noted, petitioners had no reasonable expectation of privacy in the basement area of the building located at 103 New Britain Avenue and thus lack standing to assert that the basement entries violated the statute or the Constitution (*Volpe* Br. 11-13). None of the petitioners was present when the FBI agents entered the storefront office to plant the listening device, and petitioners presented no evidence to suggest that they had either a proprietary or a possessory interest in those premises sufficient to allow them to contest intrusions made in their absence. See *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *United States* v. *Galante*, 547 F. 2d 733, 739-740 & n.11 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lisk*,

[4]We are sending petitioners' counsel a copy of our brief in *Dalia*.

[5]Petitioners' contention (Pet. 23) that they have "statutory standing" is therefore without merit. In any event, in enacting Title III Congress did not intend to grant defendants broader standing to challenge allegedly illegal governmental intrusions than is conferred by the law of search and seizure generally. See S. Rep. No. 1097, 90th Cong., 2d Sess. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 175-176 n.9 (1969).

522 F. 2d 228, 230-231 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). Hence, the surreptitious entries could not have infringed any interests of petitioners that the Fourth Amendment or Title III was designed to protect. Regardless of the outcome of *Dalia*, they would not be entitled to invoke the exclusionary rule. *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 12.

2. For the reasons stated in our brief in *Volpe*, petitioners' remaining challenges to the district court's rulings are insubstantial and do not warrant review by this Court. The government's unintentional failure to disclose the existence of a state wiretap conducted more than two years before the electronic surveillance in this case does not require suppression of the evidence derived from the interception orders (*Volpe* Br. 13-17). In addition, the district court correctly concluded (430 F. Supp. at 936-937) that the government provided the issuing judge with sufficient specific information establishing the need for the interception of oral, as well as wire, communications (*Volpe* Br. 17-18).[6]

[6]We have been informed by petitioners' counsel that petitioners are withdrawing the remaining contentions (Pet. 26-29) in the petition and will so advise the Court. We therefore have not responded to these arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1979

DOJ-1979-03